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CIVIL AND POLITICAL RIGHTS, INCLUDING QUESTIONS OF INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY

Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Coomaraswamy, submitted in accordance with Commission resolution 1999/31

Addendum

Report on the mission to Guatemala

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Introduction

1. The present report concerns a fact-finding mission to Guatemala undertaken from 16 to 26 August 1999 by the Special Rapporteur on the independence of judges and lawyers, pursuant to the mandate contained in Commission on Human Rights resolution 1994/41, as renewed by resolution 1997/23 extending the mandate for a further three years. This mandate calls upon the Special Rapporteur, inter alia, to inquire into any substantial allegations transmitted to him and report his conclusions and recommendations thereon.

2. The Special Rapporteur has received numerous complaints concerning threats, intimidation and harassment of lawyers, judges and prosecutors, resulting in the independence of the judiciary being undermined. The Special Rapporteur has also received complaints regarding allegations of impunity for human rights violations. This impunity is alleged to stem from the failure of the authorities to effectively investigate such violations and the failure of the justice system to prosecute those accused of such violations.

3. In light of the seriousness of the allegations received, the Special Rapporteur sought, by a letter dated 23 March 1999, the consent of the Government of Guatemala to undertake a visit to the country in order to inquire into the allegations made and to study the state of the independence of the judiciary. The Government responded favourably to this request in a letter dated 11 June 1999 and facilitated the mission through the Permanent Representative of Guatemala to the United Nations Office at Geneva to whom the Special Rapporteur expresses his gratitude.

4. The issues examined by the Special Rapporteur can be summarized as follows:

(a) The state of the administration of justice and in particular the independence and impartiality of the judiciary;

(b) Allegations of threats, harassment and intimidation of judges, prosecutors and lawyers;

(c) Allegations of impunity in human rights related offences;

(d) System of legal education and qualification for admission to practise law;

(e) Revision of outdated laws and consolidation of laws;

(f) The incidence of lynchings and its impact on the rule of law;

(g) Judicial reforms and the involvement of the international community and funding institutions.

Pursuant to Commission resolutions 1997/16, 1997/43 and 1997/78, the Special Rapporteur also inquired into concerns regarding the indigenous community, women and children during his mission.

5. The Special Rapporteur, during the course of the mission, met with the President of the Republic, the Minister for Foreign Affairs, the President of the Congress, deputies from different political parties, the Attorney-General, the Minister of Defence, the Minister of the Interior. He also met with the Presidential Human Right Commission, the Human Rights Ombudsman, the President and Magistrates of the Supreme Court, the President and Magistrates of the Constitutional Court, the President and members of the Bar Association, the members of the Ad Hoc Commission for the Judiciary, members of the Constitutional Postulation Commission, including the President of the public University of San Carlos and the President of the private University Rafael Landivar. The Special Rapporteur also had consultations with the Director of the School of Judicial Training, the Solicitor General, the Director of the Public Defence Office, members of the Disciplinary Chamber of the Judiciary, as well as many judges, lawyers and law students.

6. The Special Rapporteur met with representatives of the business community, the Comite Coordinador de Asociaciones Agricolas, Comerciales, Industriales y Financieras (CACIF), representatives of the union of the judicial branch and a large number of representatives of unions in the country.

7. The Special Rapporteur met with representatives of international donors, including the World Bank, USAID and the Soros Foundation. He also met with representatives of the Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Children's Fund (UNICEF), the Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala (MINUGUA), the United Nations Development Fund (UNDP), the European Union (EU), and of the embassies of Belgium, Canada, Finland, France, Germany, the Netherlands, Norway, Spain, Sweden, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

8. The Special Rapporteur also met with representatives of a large number of non-governmental organizations dealing with issues related to his mandate, including Mrs. Rigoberta Menchú. He also visited a detention centre for juvenile delinquents, "Las Gaviotas" in Guatemala City.

9. The Special Rapporteur visited the cities of Guatemala City, Solola, Quiche and Quetzaltenango during the course of his mission.

I. GENERAL BACKGROUND

10. Guatemala's 34-year civil war ended in late 1996 with the signing of a United Nations-supervised peace accord. A total of 13 Peace Agreements[1] were signed between President Arzu's administration and the Unidad Revolucionaria Nacional Guatemalteco (URNG) guerrillas. These Agreements addressed, in part, the issue of the independence of the judiciary.

11. In the years following the Peace Agreements, efforts have been made to reform the Guatemalan justice system. For instance, the Commission on the Strengthening of the Justice System was established in March 1997, having been recommended by the 1996 Agreement on the Strengthening of Civilian Power and on the Role of the Armed Forces in a Democratic

Society.[2] A year later it recommended sweeping changes such as the reform of constitutional provisions regarding the Supreme Court of Justice, the enactment of a law on the judicial career, and the increase of the budget resources of the judiciary. It also advocated the strengthening of the institutional capacity of the judiciary and endorsed the organization and systemization of customary laws and suggested a national debate on the subject. In 1998, an Ad Hoc Commission for the Judiciary was set up to implement these recommendations.

12. The Commission for Historical Clarification (CEH) was established pursuant to the Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that have Caused the Guatemalan Population to Suffer. It concluded, inter alia:

> "The justice system, non-existent in large areas of the country before the armed confrontation, was further weakened when the judicial branch submitted to the requirements of the dominant national security model. The CEH concludes that, by tolerating or participating directly in impunity, which concealed the most fundamental violations of human rights, the judiciary became functionally inoperative with respect to its role of protecting the individual from the State, and lost all credibility as guarantor of an effective legal system. This allowed impunity to become one of the most important mechanisms for generating and maintaining a climate of terror."

The Commission had no authority to judge individual complaints. The Commission stressed that many of the shortcomings of the Guatemalan judicial system stemmed from a lack of independence of the individual judges. The few judges, it concluded, that were independent were victims of repressive acts, including murder and threats.

13. Following a recommendation made by an independent expert, Mr. Christian Tomuschat, the Presidential Commission for Coordinating Executive Policy in the Field of Human Rights (COPREDEH) was established in 1991. It is part of the executive and is under the direct supervision of the President of the Republic who appoints the Director. COPREDEH is called upon to make recommendations and to implement human rights policies and programmes within the executive branch itself.

14. MINUGUA was established in November 1994, in compliance with the Comprehensive Agreement on Human Rights. Its role is to monitor compliance with the Government-URNG human rights agreements and it has submitted nine reports to the Secretary-General of the United Nations concerning its findings. In its most recent report, dated 10 March 1999, MINUGUA concluded that the primary weakness in the area of human rights remains the inability to tackle the problem of crime through the administration of full and speedy justice. MINUGUA has identified the main shortcomings of the judicial system as: budgetary constraints, insecure conditions of work, the failure to protect witnesses, impunity and the limitations of the criminal investigation system and in the administration of justice, the lack of commitment and diligence regarding the prosecution of human rights violations by State agents, and the harassment of human rights defenders and witnesses.[3]

15. The OHCHR office in Guatemala was established as part of a technical cooperation project signed between OHCHR and the Government in 1996. The project focuses on the

strengthening of Guatemala's national capacity in human rights. The office, in cooperation with MINUGUA, has been providing support at various levels to the Police Academy and to the Office of the Human Rights Ombudsman in relation to the training of the National Civilian Police.

16. Guatemala has ratified, inter alia, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child. It has also ratified the American Convention on Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and International Labour Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169). Guatemala has also submitted to the jurisdiction of the Inter-American Court of Human Rights.

II. THE CONSTITUTION AND THE ADMINISTRATION OF JUSTICE

17. The Constitution of the Republic of Guatemala is an impressive document that specifically provides for the separation of powers within a democratic State. Each branch of Government is also expressly provided for in this Constitution whilst a centralized national administration is also stipulated.

18. Chapter I of the Constitution spells out a list of basic fundamental rights as provided generally in the International Bill of Human Rights.

19. The provisions relating to an independent judiciary and to the general administration of justice are detailed and encompassing.

(a) Article 203 of the Constitution relating to the Judicial Organism states, inter alia:

"The magistrates and judges are independent in the exercise of their functions and are subject solely to the Constitution of the Republic and the laws. Whoever attempts to undermine the independence of the Judicial Organism in addition to the penalties set by the Penal Code, would be barred from exercising any public office."

(b) Article 205 of the Constitution provides for guarantees of the Judicial Organism, inter alia:

"The following are established as guarantees of the Judicial Organism:

"(a) Functional independence;

"(b) Financial independence;

"(c) Irremovability of the magistrates and judges of the first instance, except in cases established by law, and

"(d) The selection of personnel."

20. The judiciary is composed of a Constitutional Court, a Supreme Court, appellate courts, lower courts, and courts of special jurisdiction. There are, in total, 574 judges: 13 Supreme Court Justices, 64 magistrates of the appellate courts, 213 first instance judges, 284 Justices of the Peace. Of these, 157 are women.

21. In relation to the Supreme Court, article 215 provides:

"The Magistrates of the Supreme Court of Justice shall be elected by the Congress of the Republic for a period of five years from a list of twenty-six candidates proposed by a postulation commission composed of a representative of the Rectors of the Universities in the country, who shall preside, the Deans of the Law or Juridical and Social Sciences Departments of each University of the country, an equivalent number of members elected by the General Assembly of the Association of Lawyers and Notaries of Guatemala and by an equal number of representatives elected by the titled judges of the Court of Appeals and other tribunals referred to in article 217 of this Constitution."

22. Article 217 of the Constitution stipulates, inter alia, that magistrates:

"shall be elected by the Congress of the Republic from a panel of candidates with double the number to be elected, proposed by a postulation commission composed of one representative of the Rectors of the Universities in the country, who shall preside, the Deans of the Law or Juridical and Social Sciences Departments of each University of the country, an equivalent number of members elected by the General Assembly of the Association of Lawyers and Notaries of Guatemala and by an equal number of representatives elected by the judges of the Supreme Court of Justice."

23. Article 208, in relation to the terms for magistrates and judges, provides:

"Magistrates, whatever their category, and judges of first instance, will hold their positions for five years, with the possibility of the former being re-elected and the latter reappointed. During that term they cannot be removed or suspended, except in the cases and with the formalities provided [disponga] by law."

24. Chapter IV of the Constitution provides for a permanent Constitutional Court of five magistrates with five alternates. The essential jurisdiction of the court is the defence of the constitutional order. The court sits with a full bench of five. When seized with matters of constitutionality against the Supreme Court or the President or Vice-President, the number is raised to seven, the other two magistrates being selected by lot from among the alternates. The magistrates serve for a period of five years and are appointed, one each, by the Supreme Court, Congress, the President in the Council of Ministers, the University of San Carlos, and the Bar Association.

25. Article 251 of the Constitution specifies that:

> "The Public Ministry is an auxiliary institution of the public administration and the courts with autonomous functions whose principal goals are to see to the strict fulfilment of the country's laws."

26. The post of Attorney-General is established in article 252:

> "The Office of the Procurator General of the Nation has responsibility and consultative activities for the state organs and entities."

The provision goes on to specify that the Attorney-General will be appointed by the President and can be removed by him for a duly established just cause. The post must be occupied by a lawyer belonging to the Bar and have the "same qualities corresponding to a magistrate of the Supreme Court of Justice". It also provides that appointment to this post is for four years' duration.

27. Article 273 of the Constitution also establishes a Commission of Human Rights:

> "The Congress of the Republic will appoint a Commission of Human Rights made up of a deputy for each political party represented in the corresponding period. This Commission will propose to the Congress three candidates for the election of a Procurator who will have to meet the requirements of a magistrate of the Supreme Court of Justice and will enjoy the same immunities and privileges as the deputies to Congress."

28. Article 274 goes on to clarify the position of the Ombudsman:

> "The Procurator of Human Rights is a commissioner of the Congress of the republic for the defence of Human Rights guaranteed by the Constitution. He will have the power to supervise the administration, will have a term of five years, and will make an annual report to the plenary of the Congress with which he will have dealings through the Commission of Human Rights."

29. The Basic Law of the Judiciary (Decree Law 2-89) provides for the supremacy of the Constitution. It also provides, in article 9, that human rights treaties take precedence over Guatemalan law. Article 16 also provides for due process of law.

30. Guatemala has ratified many international human rights treaties, as noted above, and as such it is pertinent to note that article 46 of the Constitution provides that:

> "The general principle is established that in the field of human rights treaties and agreements approved and ratified by Guatemala have precedence over municipal law."

31. The Criminal Procedure Code was amended in 1994 and is seen as one of the major reforms that predate the Peace Accords. It did away with the inquisitorial system and introduced to Guatemala the common law adversarial system. It provides for the presumption of innocence,

the right to be present at trial, the right to counsel, plea bargaining, and the possibility of release on bail. The Code also provides for language interpretation when necessary. It also changed the roles of important actors, placing control over investigation and prosecution of cases in the hands of prosecutors. It is stated that the Public Ministry, which is independent of the executive, may initiate criminal proceedings on its own volition or in response to a complaint. The Code also stipulates the responsibilities of the Public Prosecutor's Office, including the direction of criminal investigation in coordination with the police, the gathering of evidence at the pre-trial stage, and the presentation of its findings and petitions to the judge.

III. THE MAY 1999 REFERENDUM ON AMENDMENTS TO THE CONSTITUTION

32. In October 1998, Congress approved a number of key constitutional reforms envisioned by the Peace Accords which were submitted for the approval of the citizens through referendum on 16 May 1999, pursuant to article 173 of the Constitution. These reforms were not approved. Only 18 per cent of those eligible to vote cast their votes. The reforms, if approved, would have recognized the multi-ethnic, pluricultural and multilingual nature of the country, permitted a civilian Minister of Defence, redefined the role of the military and included a set of 22 reforms dealing with the administration of justice.

33. The constitutional reforms included, inter alia, the recognition of indigenous customary law, the dispensation of justice in the local languages, the preference for oral hearings over written pleas, the simplification of proceedings, the implementation of the Law on the Judicial Career dealing with the system of appointments, promotions, rights and obligations of judges and magistrates, and disciplinary proceedings. It also included the establishment of a Council of the Judicial Career and Discipline. It provided for the implementation of a Law on the Judicial Civil Service. The package of reforms also included a provision concerning the election of 15 Magistrates of the Supreme Court for a period of seven years. It also provided for military tribunals with jurisdiction over those members of the military who were responsible for military crimes. It excluded from the competence of military tribunals cases concerning common crimes committed by members of the military. The reforms also included an increase of the budget of the Judicial Organism from 2 per cent to 6 per cent.

IV. OBSTACLES TO AN INDEPENDENT JUDICIARY

A. Threats, intimidation, harassment

34. It has been alleged that in cases concerning human rights violations there is a strong suspicion, based on circumstantial evidence, of military involvement. In these cases, it was alleged that the influence of the military had further hindered the speedy, impartial administration of justice, and in some thwarted due administration of justice.

35. The Special Rapporteur learned that in cases concerning human rights, the judges, prosecutors and defence lawyers involved were subjected to threats, intimidation and harassment. Citing a lack of resources, the Government has not offered judges and prosecutors

protection when they are faced with threats. The Special Rapporteur was also informed that in the rare instances where protection is provided, those persons assigned by the State are allegedly unqualified and sometimes had criminal records.

36. First instance judges and justices of the peace felt particularly vulnerable and it has been contended that this situation had posed a serious threat to the independence of the judiciary, as it appears that judges have demonstrated an unwillingness to pursue cases concerning controversial violations of human rights, thus undermining the right to due process of the law.[4]

37. A first instance judge, Miriam Maza Trujillo, requested a transfer after receiving a package containing a grenade and a note warning the judge that she would be killed if she did not leave Quiche. Judge Ana Ayerdi Castillo of the 10th Sentencing Tribunal has also publicly expressed concerns about her safety after the receipt of death threats. An appellate court magistrate, Maria Eugenia Villasenor, has also complained about the persecution she alleges that she has been subjected to owing to her involvement in high profile human rights cases, such as that of murdered anthropologist Myrna Mack. Ms. Villasenor has filed a complaint with the Inter-American Commission on Human Rights of the Organization of American States (OAS).

38. Principle 2 of the United Nations Basic Principles on the Independence of the Judiciary provides: "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."

39. The draft principles on the independence of the judiciary[5] states, in principle 27, that: "It is the responsibility of the executive authorities to ensure the security and physical protection of members of the judiciary and their families, especially in the event of threats being made against them."

40. There have also been cases in which threats made against judges were apparently made by practising lawyers. For instance, the case of Judge Maza Trujillo, mentioned above, appears to implicate an attorney in one of the cases she has handled. The Special Rapporteur was informed that the Supreme Court does not evaluate the reports and provide protection but instead transfers a judge from court to court.

41. The Director of COPREDEH pointed out to the Special Rapporteur the importance of Decree No. 70/96, dated 27 September 1996, which provides the law on the protection of persons related to the administration of penal justice, including judges, prosecutors, and witnesses. The Decree stipulates that it is for the Office of the Public Prosecutor to provide for the security of persons in relation to the administration of penal justice. The Director indicated that the Decree has not been implemented by the Public Prosecutor's office owing to a lack of funds, though she did express the hope that it would be implemented next year. In relation to budgetary constraints, the Office of the Public Prosecutor has requested an increase of 200 million quetzales from the Ministry of Finance, as there is no fixed budget for the office.[6]

42. COPREDEH has also intervened in some cases where a judge has been threatened, at the request of the judge in question. The President of COPREDEH indicated that she had received threatening calls herself and stressed that it was difficult to find those responsible for such

crimes. It was also brought to the Special Rapporteur's attention that the Inter-American Commission on Human Rights has requested government officials to adopt protective measures at the request of judges.

43. During the course of the mission, the Special Rapporteur became aware of a widespread lack of cooperation within the echelons of the justice administration. In terms of protection of the judiciary, the President told the Special Rapporteur that most of the time, the Government could not act against threats and intimidation as his Office was not informed of their occurrence by the Supreme Court. The President of the Supreme Court told the Special Rapporteur that judges were not transferred because of threats, as had been contended, but because they did not like having their conduct supervised after they complained.

44. The case of two judges, Iris Yassmin Barrios Aguilar and Morelia Rios Arana de Villalta, was brought to the Special Rapporteur's attention. The judges stated that they began to receive death threats after issuing a condemnatory judgement of the suspects in the case of the murder of a university student, Maria Alioto Lopez Sanches, who was killed by a member of the National Police during a march protesting a rise in the cost of public transportation. The judges established the responsibility of the Minister of the Interior and the Director of the National Police, among others, in the murder. The judges have filed a petition of amparo before the Constitutional Court and have a complaint with the Inter-American Commission on Human Rights.

45. Three people jointly filed a complaint with the Special Rapporteur regarding impunity in the justice system. Ms. Rudy Reynoso Batres, Ms. Sandra Esperanza Barillas and Ms. Julia Regina Ordonez Gonzalez complained that the magistrates of the Appellate Court of Retalhuleu had unfairly handled their complaint against the Mayor of San Felipe. According to the complainants, on 24 April 1998, the Mayor was found guilty of a charge brought against him by a tribunal. The Mayor appealed, but after the 10-day limit provided for by article 418 of the Criminal Procedure Code. He also appealed before the Second First Instance Court rather than the Appellate Court. The complainants contend that the magistrates of the Appellate Court of Retalhuleu should not have accepted the Mayor's petition for those procedural reasons. It is further contended that the magistrates accepted the procedurally flawed petition as they were trying to protect the Mayor. Alternate magistrates later found the petition inadmissible. The complainants sought the assistance of the Special Rapporteur as their complaint, filed with the supervisory body of tribunals, has yet to be decided.

46. The situations described above, and other complaints received and described below show a pattern leading to a perceived lack of confidence in the ability of the judicial system to tackle human rights violations. A public opinion poll of about 1,000 citizens conducted in 1997 by Aragón Associates found that 88 per cent of those polled considered the administration of justice system to be inadequate.

47. The Special Rapporteur was also apprised of the contention that judges are not provided with assistance regarding medical and health insurance. It is alleged that because of the high level of risk faced by members of the judiciary, no insurance company would provide individual or collective insurance for judges.

B. Impunity

1. Judicial irregularities

48. The Special Rapporteur was also informed of a series of irregularities regarding the case of a former military commander, Mr. Candido Noriega, that seems to illustrate the climate of impunity in the country. Mr. Noriega is currently facing a third retrial regarding a case brought by the villagers of Tuluche, in Quiche for, inter alia, murders, rapes, abductions, robberies and arson committed against them by the civil defence patrols and members of the army in 1982. After he had been acquitted of the charges at the first trial, the Ninth Appeals Chamber in Antigua overturned the verdict and ordered a new trial. Appeals and complaints against members of the Quiche Trial Court unduly delayed preparations for Mr. Noriega's second retrial. The Supreme Court then ordered members of the Solola Court to conduct the second trial. Again, the defendant was acquitted of all charges, but the Ninth Appeals Chamber in Antigua once more reversed the decision and ordered a third retrial. The Supreme Court ordered the trial to be heard, this time by the Trial Court in Totonicapan.

49. It has been pointed out to the Special Rapporteur that Mr. Noriega's case file shows an irregular and flawed investigation, that there were grave defects in the list of charges, and that the judges failed to follow proper procedure at the intermediate stage as well as at the trial itself. The file also shows that there were substantive and formal irregularities in the evaluation of evidence and that there were violations of guarantees of an independent, swift and impartial trial. It is also contended that rights relating to access to justice, interpreters, to proper investigations and appropriate imposition of penalties were also violated. The Special Rapporteur was also informed that one consequence of such long and delayed trials is the possibility that some key witnesses may refuse to testify a third time. Hence, the time from the complaint to the final stage of the trial may well ensure impunity.

50. The Special Rapporteur was also informed of the ruling, on 12 August 1999, on the Xaman case[7]. This ruling was criticized by MINUGUA on the basis that it served to increase the climate of impunity in the country. It was contended that the public prosecutor did not conduct an appropriate investigation during the trial. MINUGUA illustrated this contention by stating that the public prosecutor was not prepared during the interrogations and seemed not to have studied the file and he lacked a strategy to corroborate his accusations. MINUGUA also said that the judge in the case should have classified the criminal actions of the military as a summary execution as provided for by law. It was indicated that the patrol in question in this case had fired 288 bullets at unarmed civilians. The judge, however, suggested that the patrol did not intend to kill the civilians and that there was no order to do so from their captain. The prosecutor of the Xaman case, Carlos Ramiro Contreras Valenzuela, resigned from the Public Prosecutor's Office as he was denied support from the Office, despite repeated requests for protective measures.

51. The case of the Director of Casa Alianza[8], Mr. Bruce Harris, was also brought to the attention of the Special Rapporteur during his mission. Mr. Harris presently faces criminal charges filed by Ms. Susana de Umaña, a lawyer and the wife of a former Supreme Court President. The criminal charges deal with allegations of defamation, calumny and insults based on a press conference Mr. Harris and the Solicitor General gave regarding the findings of their

joint investigation into illegal trafficking of babies for adoption overseas. During the press conference, the names of lawyers implicated in the trafficking were given and Ms. Umaña's name was included. There were allegations of interference from the Supreme Court in the proceedings of Mr. Harris's trial. The Constitutional Court in January 1999 delivered a strange decision that freedom of expression is the privilege of the media only. The Special Rapporteur has learned that Mr. Harris has filed a petition with the Inter-American Commission on Human Rights for the violation of his right of freedom of expression.

52. An indigenous non-governmental organization in Chimaltenango, Prebisterio Kaqchiquel, submitted to the Special Rapporteur information regarding individual scenarios which underline the problem of impunity. The first case brought to the Special Rapporteur's attention was that of Mr. Manuel Saquic Vásquez, who was summarily executed on 24 June 1995. It was contended that despite the perpetrator of this crime having already been identified by the First Instance Criminal Court of Chimaltenango, he has not yet been taken into custody. The second situation concerns Mr. Pascual Serech, who was assassinated by members of a civil defence patrol in 1992. The NGO asserted that the Sentencing Court of Chimaltenango has identified those responsible but they too have not been apprehended.

53. In relation to the murder of Monsignor Gerardi, discussed below, the Archdiocesan Human Rights Office (ODHA) brought to the attention of the Special Rapporteur the issue of Judge Henry Monroy, who had been assigned the case. In January and March 1999, Judge Monroy allegedly received death threats, informed the Supreme Court of this development, but did not receive protection from the Court. Because of the pressure and the threats he was subjected to, Judge Monroy resigned from the case and eventually fled the country. After the completion of his mission, the Special Rapporteur learned that the prosecutor in the Gerardi case, Mr. Celvin Galindo, had also gone into exile following threats made against his family.

54. The Special Rapporteur was also informed that the staff of ODHA had also received threats. It was learned that the former director, Mr. Ronalth Ochaeta, had left Guatemala, primarily for health reasons, but also because armed men had visited his house and intimidated his children. ODHA informed the Special Rapporteur that a complaint had been filed with the Inter-American Commission on Human Rights.

2. Unsolved murders

55. During the mission, the Special Rapporteur amassed information regarding a large number of outstanding murders that have yet to be resolved. For instance, on 11 September 1990, Ms. Myrna Elizabeth Mack Chang left her office to return home. As she walked towards her car, she was attacked by a group of men who stabbed her 27 times. Ms. Mack researched and wrote about indigenous populations displaced or destroyed because of armed political-military conflict and military counter-insurgency. Her murder is still under official investigation. Three current and former high-ranking Guatemalan military officers have been charged with being the masterminds of the crime.

56. In 1993, Mr. Jorge Carpio Nicolle was ambushed by 25 armed men, who killed him and three of his companions. Mr. Carpio Nicolle was the owner of the newspaper El Gráfico and opposed the implementation of a law concerning the granting of amnesty for members of the military who were involved in human rights violations.

57. The assassination of a human rights activist, Monsignor Gerardi, in 1998 was brought to the attention of the Special Rapporteur. On 26 April 1998, Monsignor Gerardi was beaten to death with a blunt object in the garage of the parish house where he lived. Two days prior to his death, Monsignor Gerardi had presented the findings of a project undertaken by the Guatemalan Church to document the human rights violations which took place during the country's armed conflict, it implicated the military.[9] ODHA informed the Special Rapporteur that from the outset, there has been resistance to considering the political nature of the crime despite clear evidence in that regard. ODHA, as a private plaintiff, conducted its own investigation and concluded that those responsible for the crime were members of the military who had been named in the Monsignor's report. ODHA contended that the initial judge in the proceedings, Mr. Figueroa, was not impartial and had attempted to obstruct the testimonies of individual plaintiffs. It also alleged that the initial prosecutor, Mr. Ardon, had refused to accept any suggestion that the crime was politically motivated.

58. The assassination of the President of the Constitutional Court, Mr. Epaminondas Gonzales, in 1994, was also brought to the attention of the Special Rapporteur. The prosecutor in the case informed the Special Rapporteur that his investigations suggested possible military involvement in the killing.

59. The Special Rapporteur was not able to obtain official statistics from the Government, as the government departments generally did not keep statistics. However, the Special Rapporteur was given from an independent source statistics for 1996, which showed that only 10 per cent of the violent homicide cases reached the courts. That means that there was about 90 per cent impunity. There was no information on what percentage of the 10 per cent that went to courts resulted in convictions.

C. Judicial training, security of tenure, appointments (elections) and dismissals

60. The Special Rapporteur was concerned at the lack of security of tenure for judges. In the 1985 Constitution of the Republic of Guatemala, article 208 states:

> "Magistrates, whatever their category, and judges of first instance, will hold their positions for five years, with the possibility of the former being re-elected and the latter re-appointed."

The Special Rapporteur stressed the view that article 208 may be in violation of the fundamental provision of security of tenure for judges for the protection of judicial independence as set forth by principle 12 of the United Nations Basic Principles on the Independence of the Judiciary:

> "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory requirement age or the expiry of their term of office, where such exists."

61. During the mission, the Special Rapporteur received allegations regarding the lack of transparency in the election of magistrates and judges.[10] It was claimed that no objective criteria were set for their selection. The Constitution provides that the 13 Supreme Court Magistrates are elected from a list of 26 candidates proposed by the postulation commission. The Special Rapporteur urged the Bar Association and other component institutions to elect their representatives to this commission in a timely manner owing to a concern regarding possible delays in the election process. He also urged the commission to undertake its difficult task by following objective criteria as provided in principle 10 of the United Nations Basic Principles on the Independence of the Judiciary, to ensure that the best qualified candidates are appointed:

> "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory."

The Special Rapporteur also notes that in the recent election exercises of the postulation commission, no Supreme Court Magistrate was considered for re-election.

62. On 13 October 1999, Congress made public the names of the new President of the Supreme Court, José Rolando Quesada Fernández, and of the Magistrates of the Supreme Court and the appellate courts. The Special Rapporteur has learned that most of the concerned groups he met during the course of his mission have endorsed the selections made by Congress. These groups have also indicated that this election was different from previous ones as the criteria and procedure utilized to select the judges were open to public scrutiny. The Special Rapporteur noted a misunderstanding of the tenor of article 215 regarding the timing of the election of the Supreme Court.

63. The Special Rapporteur welcomes the appointment of the Supreme Court and appellate court judges by Congress. He wishes to acknowledge the effort made by the postulation commission to use objective criteria to select candidates. The Special Rapporteur also wishes to acknowledge the effort of the Bar Association in conducting the elections of their representatives to the postulation commission speedily.

64. After the completion of his mission, the Special Rapporteur learned that the new Supreme Court appointed on 15 November 1999, 52 new first instance judges, who have not been selected or trained by the School of Judicial Training. The School of Judicial Training was established by Agreement of the Magistrates of the Supreme Court of Justice No. 13/98. Article 1 of the Agreement provides that the School is the body in charge of selecting and training candidates for judgeships and as Justices of the Peace. It does not provide training for judges and court officials. At the time of the mission, the School was training 24 candidates for judgeships, who will complete their course by March 2000, these candidates have expressed their disapproval of the Supreme Court's decision. In the days before the appointment of the 52 new judges, the President of the Supreme Court had stated that although the School of Judicial Training offered training similar to that of the universities, the School was expensive to

run. Having said that, the President stressed that the School would not be shut down. He also stated that the Supreme Court would consider the School's candidates once they had completed their training. The decision of the Supreme Court has been heavily criticized in Guatemala as it was feared that the newly appointed judges might feel obligated to those who participated in their appointment and that this would compromise their independence and impartiality.

65. During the course of his mission, the Special Rapporteur received complaints from several judges. The core of the complaints was that the Supreme Court exercised its functions of judicial discipline in an arbitrary manner. Concern was expressed over the irregular functioning of the General Supervision of Tribunals, which allegedly lacks a legal basis for conducting investigations into complaints made against judges. It was further alleged that the Supreme Court has removed judges following reports submitted by the General Supervision of Tribunals, without affording them due process.

66. With regard to the above considerations, the Special Rapporteur met with several former judges and Justices of the Peace. Mr. Ricardo Efrain Mogollón Mendoza said that he had been a Justice of the Peace in Santa Lucía of Utalán, Solola, for 10 years, until he was removed in July 1998. He alleged that his removal came about owing to an arbitrary decision by the Magistrates of the Supreme Court after he filed a complaint against two officials of his court. Mr. Mogollón indicated that he had received personal assurances from the President of the Supreme Court that his case would be reviewed, but instead it was sent to the General Supervision of Tribunals. Mr. Mogollón further asserted that he was not afforded an oral hearing during which he could have exercised his right to a defence. It was learned that representatives of the community of Santa Lucía of Utalán spoke in Mr. Mogollón's defence, indicating that he was a good judge and that the community would not accept a replacement. These representatives allege that the President of the Supreme Court had given them his assurances that Mr. Mogollón would be reinstated. The President of the Supreme Court said that the mayor of the city had manipulated the disapproval of the community regarding the decision to remove Mr. Mogollón. The Special Rapporteur inquired if Mr. Mogollón had been given the opportunity to defend himself, to which the President of the Supreme Court replied in the affirmative. The Magistrates had found that Mr. Mogollón had made mistakes that justified the sanction imposed.

67. The Special Rapporteur also met with Roberto Echevarría who had worked for the court for 10 years and had been appointed a judge in 1997. Mr. Echevarría indicated that during his judgeship he had dealt with high profile cases, such as kidnapping for ransom. He contends that the Supreme Court began questioning his rulings and subsequently dismissed him from his position. Mr. Echevarría claimed that the Supreme Court did not consider the evidence he submitted to them in his defence.

68. The Special Rapporteur encountered several more cases in which a judge had been dismissed and contended that evidence presented in defence had not been considered. For instance, a former Justice of the Peace, César Augusto García, was dismissed in July 1999 because the Magistrates found that Mr. García had not completed his law degree and had not taken the requisite exams. Mr. García indicated that evidence he submitted was not taken into account. A first instance judge, Welter Marcias Solaris, was dismissed by the Supreme Court and he also claimed that he was not given the opportunity to present his defence.

69. Justice of the Peace Ronel Barrios was dismissed in 1994 following a statement he made regarding the precarious situation of judges in the interior of the country. The dismissal was based on anonymous complaints against Mr. Barrios and he successfully challenged the decision in the Constitutional Court and was reinstated one year later. A former judge Efrain Vallencillos Morales, claimed that the Supreme Court dismissed him after he rendered a decision on a particular case that set the suspects free.

70. Allegations regarding the interference of the mass media in the administration of justice were brought to the attention of the Special Rapporteur. It was alleged that in newspaper editorials, suggestions were made as to the sanctions that should be imposed on judges and the people who should be sentenced. Most of these editorials have called for the implementation of the death penalty. The death penalty is proscribed by the American Convention on Human Rights and hence was not applied by judges. This avoidance of the death penalty and strict adherence to the Convention caused the mass media to accuse the judges concerned of contributing to a climate of impunity. In view of these serious allegations, the Special Rapporteur attempted to meet with the editors in chief of the major newspapers, but was unable to do so, as their representatives did not appear for the appointment. The Special Rapporteur wishes to emphasize the importance of the mass media, especially newspaper editorials, as a powerful tool for effecting important changes in a society. Therefore, he stressed the need for the editors in chief of newspapers to understand and promote the implementation of judicial independence and international standards such as those contained in the American Convention on Human Rights. The Special Rapporteur also wishes to emphasize that the mass media play an important role in the education process concerning human rights.

D. The legal education system and the legal profession

71. During the course of his mission, the Special Rapporteur learned of allegations regarding deficiencies in the Guatemalan legal education system.

72. There are six law faculties in Guatemala: one at the public San Carlos University and the others at private institutions. Two law faculties have recently been established, one of which provides law degrees after following weekend classes. Law faculties set their own curricula and the quality of the education varies. Most require a passing mark in an examination as well as the satisfactory presentation of a thesis for the issuance of a certificate. The content of the examinations also differs from one university to another.

73. Law faculties have placed their academic emphasis on the teaching of civil and commercial law. Little attention has been given to teaching human rights law or constitutional law. However, owing to the recommendations of the Commission on the Strengthening of the Judiciary, San Carlos University and Rafael Landivar University, a private institution, are in the process of modifying their curricula. The latter university currently offers a Masters degree in human rights, with the assistance of the European Community and the Inter-American Institute for Human Rights. Principle 9 of the United Nations Basic Principles on the Role of Lawyers provides:

> "Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law."

74. Reports were brought to the attention of the Special Rapporteur regarding a serious lack of consistency among universities regarding entrance qualifications and examination standards. It was alleged that 92 per cent of the law students, approximately 10,000 people, at San Carlos University would be unable to obtain their degrees owing to the high standards set for the final examination. The Director of the School of Judicial Training said that most of the candidates for Justices of the Peace and first instance judges had serious gaps in their academic knowledge. She indicated that 95 per cent of the candidates failed the pre-selection test which deals with basic legal concepts. The Special Rapporteur learned that there are no State guidelines governing legal education. Furthermore, it was reported that an amparo petition has been entered before the Constitutional Court against the Ministry of Education, concerning the dearth of regulations.

75. In view of the information received regarding an apparent disparity between the law faculties, the Special Rapporteur asked the members of the Council of the Bar Association whom he met whether the Association had established any criteria to determine entrance qualifications to practise law. The Bar Association stated that law students who have received their law degrees were immediately able to practise law after joining the Association.

76. The Special Rapporteur stressed the view that given the fact that the Council of the Bar Association is the executive body of approximately 6,000 lawyers, it should be one of the Council's duties to ensure that those who are admitted to the Bar Association are professionally trained. The Special Rapporteur suggested that the Bar Association propose legislation concerning the need for a single entrance examination to the Bar in order to ensure that only those candidates who passed that examination would be able to discharge the functions of lawyers. The Bar Association replied that it could not initiate legislation though it believed that ideally there should be one examination administered by all the law faculties of the country. The Special Rapporteur stressed his view that as long as such an initiative was undertaken by the Bar Association with the support and assistance of the universities, it would be unlikely that the proposals for reform would be rejected.

V. STEPS TOWARDS REFORM

(a) The modernization of the judiciary and the assistance of the international community

77. The judiciary, by means of an internal Commission for the Modernization of the Judiciary has prepared a modernization plan for the period 1997-2000. Implementation of the plan began in 1997 after gaining approval from the Supreme Court. The plan was based on consultations with both internal and external sources, during which five principal problems were identified within the judiciary: the poor quality of the work of the courts; limited access to the

courts, corruption, poor court management, and a division between society and the judiciary. The international community has contributed significantly to these efforts towards reform of the administration of justice.

78. UNDP submitted a reorganization plan that includes mechanisms to regulate important areas such as the policy for hiring court personnel and the system used in appointing judges. It stipulates the creation of a human resources unit that would provide for the organization of the administration within the judiciary. It also establishes a clear division between the administrative and jurisdictional functions of the Supreme Court. The Special Rapporteur wishes to acknowledge as a positive development the recent approval of this plan by the Supreme Court.

79. Foreign donors, such as the World Bank, USAID and the Inter-American Development Bank, have provided funding to enable Guatemala to undertake the implementation of the reorganization plan. The importance of UNDP as the national coordinator was emphasized to ensure coordinated action and to ensure that the programmes envisaged by the modernization plan do not overlap. USAID has chosen to administer its own funds and will focus them on the criminal sphere.

80. UNDP has also provided funds to improve the functioning of the courts, including the process of selecting judges and the initial training of Justices of the Peace and first instance judges. The Government of Spain has also provided financial aid to be used in cooperation with the School of Judicial Training for the selection of judges and their initial training.

81. The World Bank has loaned a sizeable amount of money to improve court management and in the area of judicial reorganization. UNDP has allocated funds provided by the Government of Sweden for the strengthening of institutional management. Administrative reorganization is being supported through a loan from the World Bank and UNDP till 2004. UNDP (Sweden) is helping to fund the tasks of the Ad Hoc Commission for the Judiciary. These include ensuring that the recommendations made by the Commission on the Strengthening of the Judiciary are followed through as well as lending assistance for the drafting of the Law on the Judicial Career and the Law on the Judicial Civil Service. USAID, the Secretariat for Peace (SEPAZ) and the Soros Foundation have also contributed financially. The Special Rapporteur pointed out the need for leadership coordination in carrying out the modernization plan as a whole. The suggestion that the Ad Hoc Commission should undertake this task was considered. The original mandate of the Ad Hoc Commission needs to be amended. It was learned that this could be accomplished through a presidential decree.

82. The Special Rapporteur welcomes the contribution of the international community in the ongoing process of the modernization of the Guatemalan judiciary. During a meeting with the international donors, the Special Rapporteur stressed the need to include in the modernization plan, a plan encompassing the reform of the legal education system and the legal profession, and the revision of outdated laws. He emphasized the need for a holistic approach to the reform of the judiciary, which would entail the inclusion of input from other sectors in the modernization process, such as the indigenous community, the business community, research institutions and the mass media.

B. Proposals for legislative reforms

83. The Commission for the Strengthening of the Judiciary submitted the proposed Law on the Judicial Career to Congress for approval. The Ad Hoc Commission provided technical support in the drafting process.

84. The Law provides for the active implementation of the principles of independence and impartiality. It provides for the irremovability of Justices of the Peace and it also declares that judges and magistrates will remain in their posts for a period of five years as provided for in the Constitution. It goes on to stipulate that they may be re-elected, though this is provided for in the Constitution. The law also establishes the organs that will be in charge of the judicial career, such as the Council of the Judicial Career, the Council on Judicial Discipline, the postulation commissions, and the Unit for Institutional Training.

85. The Council on Judicial Discipline will be in charge of the implementation of disciplinary measures as provided for by law but the Law on the Judicial Career excludes it from having competence regarding cases of dismissal, which have been reserved for the appointing authority. The Unit for Institutional Training has been designated as the body in charge of selecting judges by way of examination. It is also provided that once this examination has been concluded, the Unit will furnish the Supreme Court with a list of those candidates eligible to be selected as judges. All those who pass the examination shall take a course of six months' duration organized by the Unit. It is pertinent to note here that this proposed legislation does not provide for the continuation of the School of Judicial Training and that the current Director of the School was unaware of this.

86. The proposed law also stipulates that judges can be transferred for one of two reasons. The first is reasons relating to their service; for a transfer on this basis to occur, the Council of the Judicial Career must hold a hearing and adopt a resolution, which must be accepted by the Judge. The Judge must be compensated for expenses incurred as a result of the transfer. The second reason for a transfer is at the judge's request.

87. The proposed legislation also provides that each judge against whom a complaint has been filed should have the right to be heard and to be notified of the decisions on his or her case, and that the defence lawyer of the magistrate or judge may be present during the hearing. It also provides that complaints may be filed in writing or orally. There is also a provision for the right to appeal the decision of the Council on Judicial Discipline to the Council of the Judicial Career.

88. There is also proposed legislation dealing with the judicial civil service. This law seeks to regulate the labour relations between the judicial organ and all those working for it. For instance, it stipulates that an examination should be the prerequisite for a judicial career, amongst other provisions.

89. The Special Rapporteur during the mission sought the assurance of the President of Congress that the approval and enactment of the Law on the Judicial Career and the Law on the Judicial Civil Service would be expedited. This assurance was given. The Special Rapporteur is

pleased to note that the two laws have since been approved by Congress. The Law on the Judicial Career is generally in accordance with international standards concerning judicial independence and impartiality.

90. However, the amendments to the Basic Law on the Judiciary have still to be accomplished. The Special Rapporteur wishes to point out that the reform proposals should take into account the relevant sections of the reorganization plan, particularly the human resources management unit provisions which serve to regulate the functions of the Supreme Court and its President. The proposed reforms of the Basic Law should also take into account the stipulations of the Law on the Judicial Career and the Law on the Judicial Civil Service.

C. Revision and consolidation of legislation

91. Different sectors informed the Special Rapporteur of the inadequacy of several decrees regulating different areas. It was contended that these decrees are inadequate, as they have become obsolete and are not in compliance with international treaties that Guatemala has ratified. Some were inconsistent with the Constitution.

92. The Special Rapporteur has learned that OAS in Guatemala and Congress have signed an agreement by which the Secretary-General of OAS has agreed to provide assistance in reviewing Guatemalan legislation. This will be done in order to recommend the abrogation of antiquated legislation and the creation of a National Registry of Legislation. The agreement was signed within the framework of a programme, financed by the Inter-American Development Bank and sponsored by OAS, which is aimed at supporting the peace process in Guatemala as well as the consolidation of democracy.

93. The Special Rapporteur has been informed that some progress has been made in this exercise and that to date some 710 decrees have been recommended for repeal. The review is expected to be completed by the year 2000.

VI. RESPONSES TO ALLEGATIONS

94. In response to the allegations made and the complaints received by the Special Rapporteur, the President of Guatemala, Álvaro Arzú stated that the Supreme Court was the only body that could confirm the claims made relating to threats, harassment and intimidation of judges and prosecutors.

95. The Special Rapporteur pointed out the repeated allegations concerning the lack of assistance to judges and prosecutors who faced threats, despite their requests for protection. The most common reason given for this was an alleged lack of resources. In this regard, the Special Rapporteur emphasized that he had received information that the judiciary was currently provided with 4 per cent of the national budget, 2 per cent is the minimum provided for in the Constitution. The President stressed that it was not an institutional policy of the State to interfere with the independence of the judiciary and that protection would be provided once the Magistrates of the Supreme Court had determined the legitimacy of the request.

96. The Attorney-General told the Special Rapporteur that he did not have many cases involving harassment, threats and intimidation against judges as the Supreme Court was responsible for forwarding those complaints to the Office of the Public Prosecutor. He stressed that when such cases came to his attention, the public prosecutor had investigated. The Attorney-General mentioned the case of Judge Henry Monroy and stated that the judge had not filed a complaint with the Office of the Public Prosecutor indicating that he was receiving threats. The Special Rapporteur stressed that the Office of the Public Prosecutor should conduct thorough investigations concerning alleged threats against judges and prosecutors as soon as it learned of them. The Attorney-General stated that his Office needed concrete facts and information before it could act, though there should be better coordination between the Public Prosecutor's Office and the judiciary in regard to threats, harassment and intimidation issues.

97. The Attorney-General also told the Special Rapporteur that the Public Prosecutor's Office currently lacked the resources necessary to be more effective. It is noted that Decree No. 70/96, which provides the law on the protection of persons relating to the administration of penal justice, has not been implemented by the Office of the Public Prosecutor owing to a lack of resources. In response, the Special Rapporteur reminded government officials of principle 7 of the United Nations Basic Principles on the Independence of the Judiciary, which provides that it is the State's duty to "provide adequate resources to enable the judiciary to properly perform its functions".

98. At his meeting with the President of the Supreme Court, the Special Rapporteur expressed the view that transferring judges after they had requested protection did not solve the problem as other judges might face a similar situation at a later date. The President of the Supreme Court said that it was not accurate to state that judges were transferred because they requested protection. During the meeting with the Plenum of the Supreme Court, the Magistrates admitted to the Special Rapporteur that they did transfer judges without their consent. However, following a decision of the Constitutional Court, they did not transfer judges unless a transfer was requested.

99. During his meeting with the President of the Constitutional Court, the Special Rapporteur was informed that since 1986, the Constitutional Court had received 35 petitions of amparo from judges. Nineteen of the petitions had been granted because the Constitutional Court had found that the judges were not given the opportunity to defend themselves against complaints made against them.

100. The General Supervision of Tribunals admitted that the procedure by which they conduct the investigations into complaints against judges had not been regulated. Draft regulations for internal methods of work had been submitted to the Supreme Court but had not been approved as the Supreme Court was of the view that article 58 of the Basic Law of the Judiciary provided sufficient authority. The Special Rapporteur mentioned the information he had received that judges were investigated on the basis of anonymous complaints and that these judges' requests for an oral hearing were not granted. The General Supervision of Tribunals replied that this practice allowed judges to provide a written response. The Special Rapporteur stressed the importance of due process and the right to be heard. If a judge so requested, an oral hearing should be held as it differed from the submission of a written explanation. An oral hearing must be permitted under international law standards, including article 14 of the International Covenant

on Civil and Political Rights and article 8 of the American Convention on Human Rights. The Special Rapporteur also noted that judges were entitled to a "fair hearing" under principle 17 of the United Nations Basic Principles on the Independence of the Judiciary.

101. The General Supervision of Tribunals stressed that they did not impose sanctions. However, the Special Rapporteur stressed the importance of its role as the Supreme Court did not decide cases concerning judicial complaints without a report from the General Supervision of Tribunals. Hence, its investigations and recommendations must be thorough and in accordance with standards.

102. The Special Rapporteur, during his meeting with the Minister of Defence, stressed his view that there was a high level of suspicion amongst the general public of military involvement in high-profile murders, such as those of Myrna Mack and Monsignor Gerardi. The Minister stated that his Ministry had cooperated with the prosecutor in the investigation of the murder of Monsignor Gerardi, and he offered to make available to the Special Rapporteur all the documentation the Ministry had submitted in regard to that case. The Special Rapporteur stated that there was a very high degree of substance to the suspicions and stressed that it was in the best interests of the Ministry to resolve these crimes in cooperation with the Office of the Attorney-General. In this connection, the Special Rapporteur asked the Minister whether he had any objection to bringing in an international team of investigators, made up of organizations such as the United States Federal Bureau of Investigation and Scotland Yard, to investigate the crimes, review all the files and to proceed further with the investigations, in order to gain public confidence in the administration of justice.

103. The Minister replied that the Ministry had always cooperated within the framework of the law and had opened its records to the Public Prosecutor's Office and to MINUGUA. The President of the Republic had already requested the cooperation of the FBI concerning the murder of Monsignor Gerardi. The Special Rapporteur stressed that such assistance should not be limited to only one aspect of the investigation. The Minister of Defence subsequently said that the Ministry would be pleased to cooperate should the FBI be called to investigate.

104. During his mission, the Special Rapporteur met with representatives of the business community (Comité Coordinador de Asociaciones Agrícolas Comerciales, Industriales y Financieras - CACIF). Together with the mass media, CACIF plays a pivotal role in Guatemala, and the Special Rapporteur therefore appealed to the group to be actively involved in judicial reform. CACIF expressed its willingness to cooperate, particularly with regard to the reform of legal education, to participate more actively in the meetings of the Ad Hoc Commission of which they are members, and to provide technical and legal assistance in the revision of commercial laws and in the drafting of new legislation.

105. The Special Rapporteur wishes to acknowledge Decree No. 145-96 of 18 December 1996, which is also known as the Law of National Reconciliation. The Decree provides for the extinction of criminal liability for political crimes and common crimes relating to such crimes that occurred during the armed conflict (art. 2). However, it prohibits such extinction for those acts that under internal and international law cannot be excused, such as genocide and torture (art. 8). Article 9 stipulates that the State has a duty to assist the victims of violations of human rights during the conflict and that such assistance will be provided through

coordination with the Secretary of Peace, who is to take into account the findings and recommendations of the Commission for Historical Clarification. The Special Rapporteur, in this connection, made particular reference to the recommendation of that Commission regarding compensation for the victims.

106. The Special Rapporteur wishes to stress the duty of the Government under international law as enunciated by the Inter-American Court of Human Rights in its judgement of 29 July 1988:

> "The State has a duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation."[11]

The Court also stated that the serious investigations provided for above must not be a mere formality preordained to be ineffective.[12]

VII. ISSUES CONCERNING THE INDIGENOUS COMMUNITY, WOMEN AND CHILDREN, AND CONCERNING LYNCHING

A. The indigenous community

107. During the meetings the Special Rapporteur conducted in the Guatemalan countryside, he was able to gather a wealth of information concerning the relationship between the administration of justice and the indigenous people.

108. The most common contention the Special Rapporteur encountered was that the Mayan people have suffered from discrimination before the courts. There were allegations that this discrimination, including by judges, extended to indigenous defence lawyers, witnesses and court officials. A facet of this discrimination was that there is allegedly no budget allocation for the provision of interpreters.

109. The case of Rax Cucul was brought to the Special Rapporteur's attention. Mr. Cucul was found guilty of murder and subsequently sentenced to death by lethal injection in the Department of Coban. It is alleged that Mr. Cucul suffered from a variety of mental disorders when he committed the crime. It was also alleged that Mr. Cucul was not provided with an appropriate interpreter during his deposition, but that he was assisted by a mental patient who was thought to speak Mr. Cucul's language. The public defender has entered a petition for a presidential pardon for Mr. Cucul. The Special Rapporteur, on the basis of the given facts and that there could have been a miscarriage of justice, appealed to the President for the pardon to be granted.

110. It was also brought to the attention of the Special Rapporteur that witnesses were reluctant to testify because of prejudice against indigenous people. This point was illustrated by the first trial of Mr. Candido Noriega, whose case is referred to above. It was alleged that 47 witnesses who only spoke an indigenous language were provided with one sole interpreter for

all of them. During Mr. Noriega's second trial, there was an interpreter for the judge and the parties had their own, but the interpretations of the former did not always correspond to the terms used by the community of Toluche, Quiche.

111. During the mission, representatives of indigenous communities reiterated to the Special Rapporteur their appeal to the Government to recognize their customary law, which the Mayan people have been using to resolve their conflicts for centuries. A proposal for constitutional reform concerning the recognition of indigenous customary law was not approved in a referendum.

112. The Special Rapporteur was apprised of the Mayan mechanism for dispute resolution as well as the overall benefits of the system. It was explained that Mayan law is not a punitive system but rather encompasses reconciliation and reparation. The entire system is aimed at bringing the parties together and avoiding confrontation. An elder of the community decides the reparation to be made. The communities have a lawyer if a party to a dispute wishes to use the formal court system instead of Mayan law. It was emphasized that the virtues of the Mayan legal system reside in its efficiency, practicality and speed. Non-indigenous people can also use the system, particularly for land disputes.

113. Although Mayan law has in the past generally been transmitted orally, Defensoria Maya, with the support of USAID and CALL of Guatemala, published in August 1999 two books on the Mayan administration of justice and the experiences in the implementation of Mayan law. The Special Rapporteur also wishes to acknowledge the recent publication by Adegmaya of a bilingual version of the Criminal Procedure Code of 1992 in Spanish and in the indigenous language of Q'eqchi'.

114. A positive development was the ratification in 1996 of the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) and the Agreement on the Resettlement of the Population Groups Uprooted by the Armed Conflict which were signed in the process of concluding the peace agreements. In this connection, the Special Rapporteur wishes to emphasize article 8 of ILO Convention No. 169, which provides for the recognition of the customs and customary laws of indigenous peoples.[13] However, it also provides that those customs and customary laws should be in accordance with the national legal system and with internationally recognized human rights. Of particular relevance are those provisions proscribing discriminatory practices before the courts and violations of due process.

115. The Special Rapporteur wishes to acknowledge the concluding observations of the Committee on the Elimination of Racial Discrimination (CERD) on the report submitted by the Government of Guatemala on 23 April 1997.[14] He also wishes to acknowledge the report on the visit to Guatemala by Mario J. Yutzis, a CERD expert, dated 25 October 1997.[15] The Special Rapporteur also wishes to acknowledge General Recommendation XIII adopted by CERD at its forty-second session in 1993.[16]

B. Women

116. Although Guatemala has ratified the Convention on the Elimination of All Forms of Discrimination against Women, it was alleged that the Government has not taken the necessary steps to fully implement the Convention, particularly with regard to the administration of justice.

117. The legislature has been urged to eliminate the gender-based discriminatory provisions of several codes, including the Criminal Procedure Code and the Labour Code, and the internal regulations of political parties. Affirmative measures to be incorporated, including the creation of a post of Minister for Women's Affairs, have been recommended.

118. The Supreme Court has proposed reforms to the Criminal Code and to the Criminal Procedure Code but some areas regarding violations of the rights of women and children are still not covered, in particular sexual crimes.[17] The Special Rapporteur also learned that there is no law in Guatemala on sexual harassment in the workplace.[18]

119. Interlocutors also asked the Special Rapporteur to include in his recommendations one that calls upon the State to provide compensation to women who were victims of rape during Guatemala's internal armed conflict. According to the report of the Commission for Historical Clarification, 25 per cent of the victims of human rights violations during the conflict were women.

120. In its concluding observations, the Committee on the Elimination of Discrimination against Women (CEDAW) concluded that the main shortcomings in relation to discrimination against women included discrimination within the law; lack of knowledge on the part of judges of the contents of the Convention; and limited participation of women in the administration of justice and public life generally.[19]

121. The Special Rapporteur also wishes to acknowledge General Recommendation No. 23 of CEDAW, dealing with article 7 (political and public life) of the Convention,[20] in which CEDAW stated that "States parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right ... to participate in the formulation of government policy and the implementation thereof and to hold public office. ..." CEDAW has interpreted "political and public life of a country" as being a broad concept which refers to the exercise of political power, in particular the exercise of legislative, judicial, executive and administrative powers.

122. The Special Rapporteur also wishes to acknowledge as a positive development the recent appointment of Ms. Juana Catina as the first woman in charge of dealing with issues relating to indigenous women.

C. Children

123. During his mission, the Special Rapporteur received information concerning deficiencies in the system of juvenile justice. These faults were seen to be due primarily to provisions of the 1979 Minors' Code which are inconsistent with the Convention on the Rights of the Child, to which Guatemala acceded in 1990.

124. The Code places all children in need of government assistance or supervision into the one category of those guilty of "irregular conduct". According to article 5 of the Code, children deemed to be engaging in "irregular conduct" include street children, children who have committed violent crimes, and children who have been abandoned or abused by their families. Thus, any of these children may be institutionalized by a juvenile judge. It was alleged that in 95 per cent of cases, irrespective of the situation of the children, the judge orders them to be detained at an observation centre for 8 days and sets a hearing within 45 days. It was claimed that during this period, children with no prior criminal records are put with children who have criminal records, thereby jeopardizing their mental and physical integrity.

125. If the judge deems, after the analysis done at the observation centre, that a child has committed a crime, that child is then sent to a detention centre pending the hearing. The Special Rapporteur learned that at this stage the children do not have rights and are denied due process. Although in no cases are children placed with adults, it was alleged that the rights of children are often violated at rehabilitation centres where there have been incidents of mistreatment, prolonged isolated detention, isolation with sick children and prolonged physical exercise.[21]

126. The Special Rapporteur had the opportunity to visit a maximum-security detention centre, Las Gaviotas, during the mission. Most of the 69 juvenile delinquents at the centre have committed, among other crimes, murder, rape, drug-trafficking and kidnapping for ransom. They normally served terms of six months to one or two years, but exceptionally they might serve two to five years. The percentage of repeat offenders was high; only 10 per cent do not commit another offence. It was stressed that the rehabilitation process had not been successful owing to the lack of support from the families of the children and the environment to which they return.

127. According to statistics provided by Casa Alianza there are 6,000 children living on the streets of Guatemala, of whom 2,000 are concentrated in the capital.[22] Casa Alianza has reported that there were 400 cases pending in the courts concerning crimes against children, including cases of abduction and violation of labour rights. The organization also stated that there is 90 per cent impunity in cases filed by them concerning violations of the rights of the child. From 1990 to 1998, Casa Alianza filed 400 cases regarding violations of the rights of children; 5 per cent were concluded with convictions whilst the remainder have been closed. It was brought to the attention of the Special Rapporteur that the public prosecutor and judges have made discriminatory remarks in relation to street children.

128. In this regard, the Special Rapporteur welcomes the decision of the Inter-American Court of 2 December 1999 against Guatemala in the case of the brutal murder of five street children in June 1990 by uniformed agents of the State. The Court, in a unanimous decision, found that the Government had violated several articles of the American Convention on Human Rights and the Inter-American Convention to Prevent and Punish Torture. That particular case was pursued with considerable vigour by Casa Alianza which was determined to secure justice. The decision is testimony to the failure of the system to address the rights and safety of street children.

129. In 1996 Congress approved Decree 78-96 which established a new Children and Adolescents Code. This new code offers alternatives concerning street children that include promising social measures. For instance, it provides that a town council may find foster families

for them. In cases of misdemeanours committed by children, the new code provides for social and educational correctional measures and in cases where a child has committed a crime, the code guarantees due process. It is also envisaged that only a small budget would be required to fully implement the new measures. However, the executive has postponed implementation of the new code. The Solicitor General informed the Special Rapporteur that there was resistance to the code from the principal opposition parties, the Evangelical Church, and interests in the commercial adoption market. The Special Rapporteur reiterated his appeal for the adoption and implementation of the new code. The Solicitor General suggested that the obstacles may soon be removed and that the Code would be implemented in the year 2000.

D. Lynching

130. During his meeting with the Minister of the Interior, the Special Rapporteur raised concerns regarding the apparent increase in lynchings in the country and their destabilizing effect. The Special Rapporteur also expressed his concern that the reasons for this increase might be related to the deficiencies in the administration of justice system.

131. MINUGUA stated in its 10 March 1999 report to the General Assembly that in its previous report, it had recommended that the phenomenon of lynching should be given priority by the Government as lynching, amongst other factors, accounted for some of the criminal violence that was hindering the enjoyment of human rights and was completely incompatible with the rule of law. The Guatemalan authorities had not acted upon the Mission's previous recommendation and the problem had in fact worsened.

132. The Special Rapporteur learned of two occurrences of lynching from the newspapers in Guatemala. The first resulted in the death of five suspects in the area of Quiche and the second resulted in the death of two suspects in the village of San Benito, Chisec, Alta Verapaz. In both instances, the suspects were alleged to have committed robbery. They were forced to confess their crimes and were subsequently set alight. In both cases, there have been reports implicating dozens of people in the lynchings.[23]

133. The Minister of the Interior stated that the first lynching had taken place in 1994. He asserted that social causes had to be taken into account, primarily the armed conflict, in order to understand why lynchings occurred. During the civil war, community security organizations and voluntary patrols were created with the power to administer justice; lynchings often took place where these patrols were based. The Minister acknowledged, however, that the situation in Alta Verapaz was the most worrisome. Another reason for the prevalence of lynching was the fact that in some areas of the country, there is virtually no State presence; police stations have a reduced number of officers who cannot exercise effective control in their jurisdiction. Currently, the police force covers only 30 per cent of the national territory. The Minister related recent incidents, which had occurred in Quiche, in which two police officers had been attacked by a mob. In addition, prior to the adoption of the Criminal Procedure Code in 1994, mayors were in charge of appointing Justices of the Peace. After the Code entered into force, mayors no longer had that function, but the judiciary did not appoint Justices of the Peace in many municipalities, thereby creating problems for communities.

134. The Minister informed the Special Rapporteur of an ambitious programme sponsored by the Ministry, in coordination with the Office of the Public Prosecutor, aimed at building a new police force. Under this programme the level of education of the new members of the police had improved, with 48 per cent having completed their secondary school education. The Minister emphasized the need to change police attitudes in order to gain the cooperation of the communities in discharging their duties. This would include the recruitment of police officers who are able to communicate with the communities in their local languages.

135. The Special Rapporteur stressed that during the training of the new members of the police, due attention should be given to the need to inculcate understanding of the principles of due process, the role of defence lawyers, and the need for mutual respect between the police and the Office of the Public Defender. Human rights, as provided in international human rights treaties, should be taught. The Minister of the Interior informed the Special Rapporteur that the Ministry had initiated a programme with the Office of the Public Defender in order to ensure the presence of one representative of the Office in every police station. The Ministry of the Interior had been working with MINUGUA on the issue of training.

136. At the conclusion of the discussion, the Minister said that it had not been demonstrated that there had been an increase in the incidence of lynching as there was no statistical evidence. The problem was concentrated in the Departments of Alta Verapaz, Quiche and Huehuetenango.

137. After the mission, the Special Rapporteur learned that a first instance judge in Totonicapan on 5 September 1999 sentenced five people found to be responsible in the lynching of one person in 1996, to fifty years in prison. This is the first time that people implicated in a lynching have been convicted and local non-governmental organizations have said that the decision has sent a clear message to those involved in summary executions. The Special Rapporteur welcomes this development.

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

138. The 1985 Constitution provides for a democratic Government based on the separation of powers and the rule of law. It provides for an independent judiciary and the basic institutions necessary for a constitutional government. The institutional independence of the judiciary and the individual independence of judges are protected. With regard to human rights, it stipulates that the international and regional treaties entered into by the Government have primacy over domestic laws. As the Government has ratified several of the major international human rights treaties, this means in essence that the International Bill of Rights is part of the law of Guatemala.

139. With regard to the security of tenure of members of the judiciary, the Special Rapporteur finds that a fixed term of five years with the possibility of re-election provided under articles 208 and 215 of the Constitution does not provide the requisite security of tenure and may be inconsistent with the principles of judicial independence as provided in article 203 of the same Constitution and principle 12 of the United Nations Basic Principles on the Independence of the Judiciary. In this regard, the Special Rapporteur draws attention to the concerns expressed by

the Inter-American Commission on Human Rights in 1996 in regard to similar provisions in the Constitution of Ecuador. The Special Rapporteur notes that among the Government's proposals defeated in the referendum, was one to amend the Constitution to provide for a seven year term of office for judges.

140. The enactment of a new Criminal Procedure Code in 1994 changed the criminal justice system from an inquisitorial system to a common-law-based adversarial system. This was a welcome step in the right direction.

141. The implementation and application of the impressive and progressive enactments and ratified treaties, however, were dismal. The justice system, which was devastated during the 34 years of armed conflict, was marginalized and has not recovered. Its neglect since has led to inefficiency and incompetence within the system, opening the corridors of the courts to corruption, influence-peddling and their associated ills. This situation is compounded by the fact that some of those who are alleged to have committed human rights crimes, including murder, have been appointed to hold public office in the administration of justice and other related key public institutions including the military. It is this scenario which has contributed to the continuing of impunity, particularly for human rights-related offences, and which gives substance to the allegations that those who have been entrusted with the investigation and/or prosecution of these crimes - particularly the high-profile ones - have been subjected to harassment, intimidation and death threats, resulting in some resigning from their assignments or even leaving the country.

142. With regard to the allegations of threats, harassment and intimidation of judges, the Special Rapporteur finds that these concerns are real. The Government had failed to provide the requisite protection or assistance to those who have complained. In this regard, the Special Rapporteur finds, with all due respect, that the Supreme Court, which was entrusted with receiving these complaints and processing them and recommending protection, failed in its duty to the judges concerned. The widespread complaints threatened and undermined the very core of the independence of the judiciary. The Supreme Court ought to have taken concerted measures in cooperation with the Office of the Attorney-General not only to recommend protection but to investigate the threats and intimidations. The Special Rapporteur notes that the Supreme Court has never made a public statement decrying the threats, harassment and intimidation.

143. The Special Rapporteur finds that the Supreme Court failed to take measures to instil public confidence in the judicial system. For example, the Special Rapporteur finds that the involvement of Mrs Susana Umaña, the wife of a Magistrate and former President of the Supreme Court, in the commercial trafficking of children for foreign adoption and the filing of a defamation suit against Mr Bruce Harris of Casa Alianza, with the resultant suspicions and concerns about the independence and impartiality of the magistrate concerned and of the system in general, have brought embarrassment and disrepute to the Supreme Court. In such circumstances, the magistrate concerned ought to have resigned in the interest of the independence of the judiciary. The judiciary must not only be independent but must be perceived by the public to be so. Mrs Umaña, though a lawyer, obviously placed her commercial interests above those of the office of the Magistrate of the Supreme Court and the independence and impartiality of the justice system.

144. With regard to impunity, the Special Rapporteur regrets the unavailability of statistics in the Office of the Attorney-General. However, not one personality in the Government denied that impunity was prevalent. With the large number of unsolved violent murders and the high incidence of impediments to investigations and prosecutions in these murders and human rights-related crimes, the 90 per cent impunity computed from the statistics provided by an independent source for 1996 should give an indication of the very high rate of impunity.

145. The Special Rapporteur finds that there is no real political will in the Government to address this evil. Here, the Special Rapporteur must warn the Government that impunity is a cancer, if it is not arrested and excised it will slowly but surely destabilize society. The disenchanted citizenry will lose confidence, if it has not already, in the Government and its administration of justice and resort to self-help and taking justice into their own hands. The extensive role played by the military in human rights violations during the armed conflict cannot but raise considerable suspicions in the minds of the people of its role in thwarting effective investigations and prosecutions in at least some of these crimes, particularly the high-profiled ones like the murders of Myrna Mack and Monsignor Gerardi. Pressure may not be institutionalized but it could come from individuals either within the military or having considerable influence in the military on the basis of the work done and exposés made by relatives of the victims of these murders, and NGOs, the murders were military-related. It is for this reason that the Special Rapporteur urged the Minister of Defence that it was in the interest of his Ministry to take every conceivable measure, in cooperation with the Office of the Attorney-General, to see that the perpetrators of these murders are brought to justice, whether committed or inspired by the military or others. So long as these murders remain unresolved and impunity is given full reign the rule of law in Guatemala will remain suspect and in jeopardy.

146. While the enactment of the new Criminal Procedure Code was a welcome development, the failure on the part of the authorities to provide timely and adequate training to the judges, prosecutors, lawyers, police and other actors on the significant changes the enactment brought, which require changes in the mindset of those involved in the administration of criminal justice, was neglected. This resulted in contributing to incompetence in the investigations and prosecutions of crimes and the adjudicative process in trials before the courts.

147. In his meetings with judges, prosecutors and lawyers the Special Rapporteur, with all due respect, found a lack of appreciation of constitutional values, the principles of judicial independence and due process generally. For example, during one meeting the Special Rapporteur found that senior judges were not conversant with the constitutional provision that international human rights treaties entered into by the Government had primacy over domestic laws. The Constitutional Court rarely invoked and applied this provision. The Special Rapporteur was told that lawyers hardly ever raised such points in their arguments.

148. Insofar as financial resources are concerned, article 213 of the Constitution entrusts the Supreme Court of Justice with the preparation of the judicial budget. This is a progressive feature as it reflects an element of financial autonomy for the institutional independence of the judiciary. The provision in the Constitution for a minimum of 2 per cent of the annual national budget for the judiciary is also a progressive feature. The Special Rapporteur has learned that currently the judiciary is provided with 4 per cent of the annual national budget. A proposal to increase this to 6 per cent, put before the people in the May 1999 referendum, was turned down.

The Special Rapporteur finds that an increase in the allocation of the national budget to the judiciary does not require the approval of the electorate in a referendum. The Special Rapporteur did not receive any serious complaints regarding judicial salaries. However, the failure to provide life/health insurance for judges was a source of concern to many. The refusal of insurance companies to underwrite such risks is no excuse. It is the responsibility of the Government to devise schemes for such protection.

149. Inadequate financial resources for the judiciary and the Office of the Attorney-General have affected the employment of adequate human resources and the provision of modern electronic office equipment, contributing to incompetence and inefficiency in the auxiliary staff in these institutions. This, of course, has led to a backlog of cases and, needless to state, encouraged bribery and corruption.

150. Inadequate financial resources also led to judges not being provided with proper courtrooms and chambers with modern office equipment. One courthouse the Special Rapporteur visited was in an appalling state close to the main street. Whenever motor vehicles passed the noise disrupted court proceedings. Such deficiencies encourage mismanagement in the system.

151. A contributing factor to the inadequacy of human resources and adequate facilities for the courts is the inefficient manner in which the Supreme Court managed these matters. The current move to separate the administrative from the judicial functions of the Supreme Court should to some extent improve the Court's administration.

152. In this connection, the Special Rapporteur welcomes the approval by Congress of the Laws on the Judicial Career and on the Judicial Civil Service. The Special Rapporteur also welcomes the approval by the President of the Supreme Court before his retirement of the modernization plan for the judiciary. With this legislation and the modernization plan coupled with some proposed amendments to the Basic Law of the Judiciary, the legal basis for the reform of the judiciary will be in place. What it requires now is implementation.

153. The Special Rapporteur finds that reform of the judiciary per se may be inadequate for the long-term well-being of an independent and impartial judiciary. Reform of legal education in the universities and of the training of lawyers for the legal profession should also be addressed. The standards of legal education in the universities offering courses for prospective lawyers vary considerably. There is no coordination of syllabuses and training periods among these universities. Graduation from any of these universities entitles the graduate to apply for membership of the single Bar Association in order to practise. There is no process for a centralized standard entrance qualification to practise law. The disparity in the quality and calibre of lawyers can be mindboggling and could seriously undermine not only the quality of the legal services the public is given but also will reflect eventually on the quality and calibre of judges as judges are selected from among these graduates and the legal profession. The Special Rapporteur was told by the head of the School of Judicial Training that the applicants who apply for judgeships hardly knew what due process was all about.

154. The failure on the part of the Government to address earlier the revision of antiquated legislation and the consolidation of laws is a serious concern. The Special Rapporteur learned

that much legislation is inconsistent not only with the international treaties ratified by Guatemala but also with the Constitution. The existence of such outdated laws on the statute books is yet another contributing factor for the incompetence prevailing in the system. In this regard, the Special Rapporteur welcomes the assistance rendered by a team of experts sponsored by OAS to revise the outdated legislation.

155. The Special Rapporteur also found that there was no organized system of continued legal education for judges, prosecutors and lawyers. This was a further contributing factor for the incompetence in the system. As was observed earlier, what was taught in the universities was inadequate. Failure to provide judges and lawyers with facilities to pursue the learning of the law and to keep up to date on developments in the law after qualifying to practise law or appointment to a judgeship compounds the incompetence in the administration of justice.

156. There is also no systematic organized compilation of and statistics concerning the decisions of the courts, particularly of the higher courts. This includes the failure to provide adequate libraries containing up-to-date materials on domestic and international law. All judges, particularly outside the Supreme Court building, complained of this lack and that it affected the quality of their work.

157. While many judges and lawyers are not exposed to developments, if any, of the domestic law, judges and lawyers are not given the facilities to follow developments of the law outside the jurisdiction. The Special Rapporteur found, again with all due respect, judges and lawyers to be very insular. He was told that they had very little interaction with the legal fraternity outside the country. In this regard, the Special Rapporteur found that there was little interaction between the judges of the higher courts and those of the lower courts. The latter felt that the former were insensitive to their problems, particularly complaints of harassment and intimidation. With regard to the disciplinary process, the Special Rapporteur finds that there is substance to the widespread allegations that justice was denied to some judges in the disciplinary process. In this regard the Special Rapporteur finds that it was improper to remove judges just because they had made mistakes in their decisions. Appellate courts are meant to correct such errors.

158. The provision in the law for the Office of the Public Defender is a welcome measure to provide legal representation for the poor though the resources made available for this Office are wholly inadequate for it to fully discharge its functions.

159. The Special Rapporteur welcomes the assurances given to him by the business community of Guatemala, through CASIF, that it would co-operate in judicial reforms, in particular with regard to legal education and revision and consolidation of the commercial laws and procedures. It must be in the interest of the business community to secure an independent justice system so that business interests of both domestic and foreign investors are served.

160. With regard to the interest and contributions of the international and regional communities and funding agencies, the Special Rapporteur welcomed their involvement in the judicial reforms. The Special Rapporteur welcomes in particular the financial commitment already made by many of these institutions and nations. The Special Rapporteur notes that with the constraints on the material resources of the Guatemalan Government the funding from these

institutions and nations are imperative for the wide-ranging reforms needed. In this regard the Special Rapporteur notes the Government's readiness to cooperate fully with these donors.

161. The work done by international agencies like MINUGUA, UNDP and OHCHR has contributed considerably to the investigation and monitoring of human rights violations and to the process of human rights capacity-building, education, and exposing of flaws in the judicial system.

162. In the present inadequate and incompetent justice system, the indigenous Mayan community, the largest ethnic group in Guatemala, accounting for more than 50 per cent of the entire population of 11.5 million, appear to be severely affected. Their complaints regarding access to the mainstream justice system are quite legitimate. Because of poverty and the absence of legal aid facilities they are denied adequate legal representation in the courts. Compounding this are the incompetent and inefficient interpretation services extended by the courts to meet their needs.

163. The Mayan community appear to have a reasonably well-developed system of dispute resolution, though the Special Rapporteur did not have the time to study this in depth. They also have their own customary law. Because of the failure on the part of the mainstream justice system to provide this community with adequate access to justice, their demand for recognition of their customs and practices is understandable.

164. With regard to the status of women, while the Special Rapporteur welcomes the appointment of the first woman in charge of matters relating to indigenous women, the allegations of gender-based discriminatory provisions in the Criminal Procedure Code and the Labour Code are of concern. The Special Rapporteur has not been able to verify the extent of discrimination, but notes with concern the finding of the Commission for Historical Clarification that 25 per cent of the victims of human rights violations during the armed conflict were women. He also learned with concern, in moving testimony by a victim of sexual harassment, that there was no law on sexual harassment in the workplace.

165. With regard to children, the Special Rapporteur was most concerned over juvenile justice, particularly for the 6,000 street children in Guatemala. These are largely abandoned children and therefore most vulnerable. The Special Rapporteur finds that the Government has not adequately discharged its obligations to provide adequate shelter, welfare and justice for these children; rather the Government depends on charitable organizations though the President of the Republic indicated that every effort is being made to look after these children. Failure to address this problem could lead to these children becoming misfits in society, thus causing serious social problems. The failure to implement Decree 78/96 on the Children and Adolescents Code is a serious concern in this regard.

166. With regard to lynching, though this phenomenon may have been part of the unpublicized scenario during the armed conflict the spate of lynchings since the signing of the Peace Accords is a serious concern. Though investigations into these cases of summary justice and extrajudicial execution are fraught with difficulties, the Special Rapporteur considers that a contributory cause of these crimes could be lack of confidence in and frustration with the state of the justice system which is unable to meet the expectations of the people.

167. With regard to the disappointing referendum of May 1999 on constitutional amendments, in which only 18 per cent of the electorate cast their ballots and defeated the proposals, the Special Rapporteur finds the low turnout and the rejection of the proposals attributable largely to failure to inform and prepare the people for such an electoral exercise. Constitutional issues are complex. Sometimes even the well-educated are not conversant with and interested in such issues. The significance and importance of the proposals and their value to constitutional Government, ultimately benefiting all the people, ought to have been widely disseminated, including among the various ethnic groups in their own dialects. The media had an important role in this sphere. In any event, some of the proposals in the referendum package did not require constitutional amendments, like the proposal to increase the budget for the judiciary (though if the constitutional minimum of 2 per cent were to be increased to 6 per cent a constitutional amendment would be required).

168. Freedom of the press, both print and electronic, is respected by the Government. The extensive media reports, commentaries and editorials on the Special Rapporteur's mission throughout the two weeks was an indication of the public interest in the justice system. The Special Rapporteur finds that the media can play a pivotal role in the reform of the system by disseminating to the public the values of judicial independence, the principles involved and the reforms required. It must be impressed upon the public that the right to an independent judiciary is not a right of judges and lawyers but a right of the people and it is therefore in their interest that such a system is secured and protected.

B. Recommendations

169. In addition to reiterating the recommendations made by the Commission for Historical Clarification regarding the administration of justice, particularly recommendations Nos. 46, 47 and 48, the recommendations made by the Human Rights Committee on Guatemala, particularly those contained in paragraphs 26 and 39 of its concluding observation (CCPR/C/79/Add.63), the recommendations made by the Committee on the Elimination of Racial Discrimination, particularly in regard to adequate interpretation services (CERD/C/304/Add.21 para. 27), and the recommendations made by the Committee on the Elimination of Discrimination against Women, particularly those concerning the judiciary (A/49/38, para. 83), and those arising from the observations and conclusions herein, the Special Rapporteur makes the following specific recommendations:

(a) With regard to threats, harassment and intimidation of judges:

(i) The Supreme Court should set up a committee in cooperation with the Office of the Attorney-General to address this problem. A procedure should be formulated for the receipt and processing of these complaints. Complainant judges should be heard when they so request. Timely action should be taken to provide the requisite protection. Judges should not be transferred without their consent. Investigations into these complaints should be real and not just superficial and prosecutions should be

preferred where evidence is available, pursuant to article 203 of the Constitution. The committee should periodically make public reports of its work;

(ii) Decree No. 90/96 relating to Protection of Witnesses etc., must be implemented and the Government should make available adequate funds for such implementation;

(iii) All judges should be provided with life insurance policies and such policies should include the risk of personal accidents;

(b) With regard to impunity:

(i) All personalities who were known to have committed human rights violations during the armed conflict should be removed from public office and from the military. In any event, those with such a record should not be elected, appointed or recruited for any public office in the future. The continued presence of officials with such a record can be detrimental to and threaten the administration of independent justice;

(ii) To allay public concerns and gain public confidence, a team of international independent investigators should be called upon to undertake a study of the investigations carried out thus far into all the unresolved murders, particularly those high profile cases where there were serious allegations of military or other political pressures impeding the investigations and prosecutions. The findings of these investigations should be made public. The investigations should be continued and completed by these investigators. While this recommendation may sound like infringing upon national sovereignty, yet national sovereignty should sometimes give way to effective building of domestic public confidence in national public institutions. This may be a small price to pay for long-term peace and security of all citizens;

(c) With regard to security of tenure of judges, articles 208 and 215 of the Constitution should be amended. While fixed-term contracts may not be objectionable and not inconsistent with the principle of judicial independence, a term of five years is too short for security of tenure. A reasonable term would be 10 years. There should however, be no provision for re-election;

(d) With regard to the reforms of the administration of justice, and in particular the judiciary:

(i) Immediate steps should be taken to implement the legislation on the judicial career and the judicial civil service recently approved by Congress together with the plans to modernize the judiciary approved by the Supreme Court. The consequential amendments to the Basic Law of the judiciary should be speeded up to complement this legislation so as to

facilitate the reform process. In addition, a judicial code of ethics should be compiled for the guidance of all judges across the spectrum of the judiciary;

(ii) The Government should substantially increase budgetary allocations to finance these reforms for the next five years to complement the aid committed by international and regional donors;

(iii) Reforms should be holistic and the various phases must be coordinated targeting priority sectors;

(iv) Coordinating international aid with domestically generated funds, including those of the Government, should be done by one agency for maximum utilization of all resources without wastage. The Ad Hoc Commission for the Judiciary, having completed its task most admirably, is suited to undertake this task. This Commission should be reconstituted with fresh terms of reference for this purpose by presidential decree;

(v) A comprehensive inquiry into legal education to standardize and upgrade the teaching of law in the universities should be undertaken as part of the reform process;

(vi) Simultaneously, a similar inquiry into the structure and organization of the legal profession should be undertaken as part of the reform process. The inquiry should include the provision of a postgraduate professional training programme prior to an examination to enter into the legal profession. The formation of a Council of Legal Education for this purpose may be desirable. A code of ethics for the conduct of lawyers should be formulated;

(vii) A permanent law reform/revision commission should be set up by the Government in cooperation with the Supreme Court, the Office of the Attorney-General, the academic community and the legal profession to revise laws and propose legal reform;

(viii) Steps should be taken to provide law libraries in courts with updated legal materials;

(ix) The Office of the Attorney-General should be provided with adequate financial and human resources and modern equipment, in order to improve skills, competence and efficiency. Again, a code of conduct for public prosecutors should be formulated in accordance with the standards contained in the United Nations Guidelines on the Role of Prosecutors;

(x) Continued legal education for judges, lawyers and prosecutors should be made compulsory. Judges, lawyers and prosecutors should be encouraged to attend international legal conferences and seminars to develop their

legal knowledge. Similarly, foreign judges and lawyers, including academics should be invited to Guatemala for better interaction with the international community of jurists,

(xi) For effective access to justice by the poor, a State-run legal aid scheme should be considered in addition to the Office of the Public Defender. In this regard, the Bar Association could play a useful role in offering its members' services gratis or for a reduced rate,

(xii) The provision of qualified interpretation services in all courts, particularly in courts to which the indigenous communities have access, should be provided as a matter of course. Interpreters should be trained for this purpose through State-run courses,

(xiii) Adequate resources, both financial and human, must be provided for the grossly underfunded Office of the Public Defender,

(xiv) The applicable standards for the reforms should measure up to the minimum set out in the United Nations Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors, and in the decisions of the Inter-American Commission and Court of Human Rights,

(e) With regard to discipline and the removal of judges:

(i) The standard of procedure should not be less than that provided in the Basic Principles on the Independence of the Judiciary,

(ii) Where it is legally possible the Supreme Court ought to review some of its past decisions to remove judges as there appears to have been a failure of justice with regard to those judges. In particular, the case of Ricardo Efrain Mogollón Mendoza a justice of the peace referred to in paragraph 65 above, appears a serious failure of justice;

(f) With regard to judicial corruption and influence peddling, an independent enforcement agency with powers to investigate complaints of corruption in public office, including in the judiciary, and prefer prosecutions should be set up. This may require separate legislation. This agency should not be part of the Office of the Attorney-General but should be a separate entity, independent of all government departments save that the facilities of the prosecutorial services of the Attorney-General's Office could be utilized. This agency should submit annual reports to Congress and such reports should be made public;

(g) With regard to monitoring and capacity-building in human rights, the work of MINUGUA and the Office of the High Commissioner for Human Rights in monitoring human rights violations and capacity-building in human rights has been considerable and has contributed to identifying areas of weakness in the administration of justice. Their continued presence, at least for the period of the reform process, is strongly recommended;

(h) With regard to the indigenous community, as part of the reform process a study should be undertaken to integrate the customary laws and practises of the Mayan community and other indigenous groups into the mainstream law. However, care should be taken to ensure that such laws and customs, including procedural customs on dispute resolution, do not violate internationally recognized principles of due process;

(i) With regard to children:

(i) The Children and Adolescents Code (Decree 78/96) should be implemented without delay;

(ii) In accordance with its obligations under the Convention on the Rights of the Child the Government should attend to the welfare of the street children and provide them with shelter and facilities for their survival and development. This is State responsibility and the Government cannot continue to ignore the plight of these children;

(j) With regard to the status of women, as part of the reform process a study should be undertaken to identify gender-based discriminatory provisions in the Criminal Procedure Code and the Labour Code and Congress should be moved to amend these codes to remove those discriminatory provisions. Sexual harassment in workplaces must be made a crime and punishable under appropriate legislation;

(k) With regard to lynching:

(i) Concerted efforts must be made by the Ministry of the Interior and the Office of the Attorney-General to investigate and prosecute the perpetrators of these violent crimes;

(ii) An extensive campaign to educate the public against self-help summary justice should be undertaken. In this regard, progress made in the judicial reforms should be made public periodically to gain public confidence in the mainstream justice system. Every citizen has a role in this exercise;

(l) With regard to the media:

(i) They should play a pivotal role in the education of the people in the values of a constitutional and transparent Government, the rule of law and the significance of the role of an independent justice system. Investigative, but responsible journalism should be encouraged so that human rights violations are exposed;

(ii) It lies ultimately with the free media to build public confidence in the administration of the Government.

Notes

[1] Of particular relevance to the Special Rapporteur are the following Agreements: Comprehensive Agreement on Human Rights (signed on 29 March 1994 in Mexico City), Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that have Caused the Guatemalan Population to Suffer (signed on 23 June 1994 in Oslo), Agreement on the Strengthening of Civilian Power and on the Role of the Armed Forces in a Democratic Society (signed on 19 September 1996 in Mexico City), and Agreement on the Constitutional Reforms and the Electoral Regime (signed on 7 December 1996 in Stockholm).

[2] "15. The Parties also agree that within 30 days after the signing of the agreement on a firm and lasting peace, the President of Guatemala will propose that a commission be established with the mandate to prepare within six months, following an extensive debate on the justice system, a report and a set of recommendations for implementation as soon as possible. That commission, which will receive advisory assistance from the Mission for the verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala (MINUGUA), shall include the qualified representatives of the various public institutions and social and private bodies that are involved in and/or are knowledgeable about the justice system."

[3] A/53/853, annex, paras. 58-62, 62-66, 76-80, 80-82.

[4] MINUGUA has described violations of the right to due process of law throughout its nine reports to the General Assembly. In its most recent report, MINUGUA stated that it had received 94 complaints involving 880 alleged violations, 534 of which were confirmed, and including 96 violations of the right to be presumed innocent, 85 violations of the right to be tried before a competent, independent and impartial tribunal, 85 violations of the right to a defence and to be assisted by a lawyer, 80 violations of the right not to be compelled to testify against oneself, 43 violations involving the obstruction of the work of the National Police, the National Civil Police, the Public Prosecutor's Office and the judiciary, and 108 violations of the legal duty of the State to investigate and punish (Ibid., para. 28).

[5] The draft principles on the independence of the judiciary ("Siracusa Principles") were adopted by a committee of experts organized by the International Association of Penal Law, the International Commission of Jurists and the Centre for the Independence of Judges and Lawyers which met at the International Institute of Higher Studies in Criminal Sciences in Siracus, Italy, from 25 to 29 May 1981. The experts comprised distinguished judges and other jurists representing different regional and legal systems in Africa, Asia, the Americas and Eastern and Western Europe. See Centre for the Independence of Judges and Lawyers, CIJL Bulletin, Special Issue, The Independence of Judges and Lawyers: A Compilation of International Standards, No. 25-26 April-October 1990, pp. 59-71.

[6] The Special Rapporteur was informed that the Minister of Public Finance, Mrs. Irma Luz Toledo, has submitted to Congress a budget for fiscal year 2000 of 22,310,000 quetzales which includes an allocation of 45 million quetzales to the judiciary, which is the 2 per cent stipulated in the Constitution. It also provides 1 per cent for the Public Ministry and 9.5 per cent for the Secretary of the Presidency.

[7] The sentencing tribunal of Coban convicted an army lieutenant and 11 of his troops for "culpable homicide" in the massacre of 11 villagers in Xaman, Alta Verapaz. They were sentenced to five years in prison commutable to 5 quetzales per day of the sentence. The court also found 13 other members of the patrol guilty of "complicity" in the homicides and sentenced them to four year's imprisonment each, also commutable at the same rate. The tribunal ruled that the soldiers had acted in self-defence. It further stated that although the soldiers had acted unwisely by entering the town, they had not entered it with the intent to harm its residents. The court also ruled that there was no evidence of a chain of command decision to kill the villagers.

[8] Casa Alianza is the Latin American branch of the New York-based Covenant House. Covenant House is a NGO in consultative status with the Economic and Social Council and the largest provider of residential and non-residential services to abandoned children and youth in the Americas.

[9] The report names 52,427 victims of killings, disappearances and torture. The report concludes that the civilian population became the principal military target in the army's effort to destroy the guerrillas and any possible civilian support. See the report prepared by the Robert F. Kennedy Center for Human Rights, The Investigation into the Murder of Guatemalan Bishop Juan Gerardi, A One-Year Update, April 1999.

[10] In this connection, the Special Rapporteur learned that on 30 July 1999, MINUGUA issued a press release expressing its disapproval of a decision adopted by a majority of Magistrates of the Supreme Court (the vote was 9 to 4, with the President dissenting) by which 23 judges were appointed without having previously been selected and trained by the School of Judicial Training. This decision was subsequently reversed by the Court.

[11] Inter-American Court of Human Rights, Velasquez Rodriguez Case, Merits, Judgement of 29 July 1988, Series C, No. 4, para. 174.

[12] Ibid., para. 177.

[13] Article 8: "1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws. 2. These people shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle. 3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties."

[14] The main shortcomings of the administration of justice concerning the indigenous population were identified by CERD. The faults pointed out include: they do not enjoy effective protection and remedies in the national courts from violations of human rights and fundamental freedoms; a lack of interpreters; insufficient public defenders; impunity; an under-representation of indigenous peoples among judges and in the administration of justice as a whole (CERD/C/304/Add.21, paras. 17-20, 24).

[15] Mr. Yutzis has identified obstacles and limitations to the peace process which specifically affect the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, particularly those related to the administration of justice. He states that exclusion from the system of justice continues to exist, especially for indigenous peoples. In this connection, various indigenous groups informed Mr. Yutzis of some of the causes of this situation, which include:

(a) The judges' fear of administering justice and the population's fear of demanding it as a result of repression by groups interested in preventing cases from being clarified, especially when members of the military or the paramilitary forces are involved;

(b) The lack of qualified staff in the courts, resulting in delays in the normal conduct of proceedings, which become very slow;

(c) The court's lack of financial resources;

(d) The fearful attitude of the victims, their relatives and witnesses, which hampers the processing of complaints, the production of evidence and the smooth conduct of proceedings;

(e) The indigenous population's low level of education and ignorance of its rights, which prevent it from being aware of the importance of having justice done and putting pressure on the judiciary for the proper administration of justice. See CERD/C/52/Misc.22.

[16] Paragraph 1 of General Recommendation XIII states: "In accordance with article 2, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination, States parties have undertaken that all public authorities and public institutions, national and local, will not engage in any practice of racial discrimination; further, States parties have undertaken to guarantee the rights listed in article 5 of the Convention to everyone without distinction as to race, colour, national or ethnic origin." CERD recommended that law enforcement officials should receive intensive training to ensure that in the performance of their duties they respect as well as protect human dignity, and maintain and uphold the human rights of all persons without distinction as to race, colour, national or ethnic origin. CERD also recommended that States parties should review and improve the training of law enforcement officials in order to ensure that the standards of the Convention as well as the Code of Conduct for Law Enforcement Officials (1979) are fully implemented.

[17] It is also necessary to establish procedures that guarantee the privacy and dignity of victims of sexual crimes. Further, the Criminal Code provision that regulates the offence of rape of a minor male classifies the offence as sexual molestation, and therefore does not carry the same sanction as rape. The provisions of the Code do not provide for criminal investigations in such cases.

[18] Victims of sexual harassment in the workplace have been changing their complaints from sexual harassment to coercion, but there is no institution in Guatemala that guarantees the security of people who file such complaints. The Labour Code, however, regards sexual harassment as a serious offence and those found responsible can be dismissed as there are provisions for disciplinary action.

[19] See A/49/38, paras. 78, 79 and 81.

[20] Sixteenth session, 1997.

[21] The Special Rapporteur learned that on 21 September 1999, a first instance judge in Mixco found that the human rights of several girls who were sent to the detention centre Los Gorriones were violated. It was reported that the girls were kept for extended periods of time in solitary confinement in small cells.

[22] The Special Rapporteur spoke with a few children who were staying in one of the 17 private shelters run by Casa Alianza. The children, ranging in age from 12 to 15, informed the Special Rapporteur that they were picked up by members of the police from the street and from buses, and taken to detention centres where they stayed for periods ranging from 1 month to 6 months without being brought before a judge. Some of them said they had been mistreated and beaten by the staff of the detention centres. Some were also sent to detention centres in "zones" other than those from which they had come, and some did not have criminal records whilst others did. They felt that they were well treated at Casa Alianza. Casa Alianza receives an average of 350 children a year. It also provides legal assistance to street children through the support of Covenant House in New York, the economic assistance from the Inter-American Development Bank, and the cooperation of the Governments of Denmark, Norway and the Netherlands. It also receives financial contributions from individuals in the United States and other countries.

[23] Prensa Libre, Wednesday 1 September 1999, at page 28.